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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LOUIS ARMANDO DIAZ, Defendant and Appellant.	H033796 (Santa Clara County Super.Ct.No. CC630909)

Defendant Louis Armando Diaz was convicted by negotiated plea of two counts of rape of a victim incapable of giving consent in violation of Penal Code section 261, subdivision (a)(2)[1] and one count of incest in violation of section 285. He also admitted having served a prior prison term. He was sentenced to a term of four years, eight months. Among other fines and fees, the court imposed a $70 AIDS education fee (§ 264, subd. (b)), a $129.75 court administration fee (Gov. Code, § 29550.2, subd. (a)), and a $200 sex offender fee (§ 290.3, subd. (a)). The minute order and the abstract of judgment reflect that penalty assessments were additionally imposed on the AIDS education and sex offender fees. The court does not appear to have determined defendant's ability to pay these three fees and expressed its belief that the fees were mandatory in any event. The court also awarded defendant a total of 1101 days of

[1] Further statutory references are to the Penal Code unless otherwise specified.

presentence credit, of which 958 were actual, under section 2933.1. The abstract of judgment reflected all of this and showed the conviction for incest as a "consecutive 1/3 violent" offense by the checking of a box with that description.

On appeal, defendant challenges the imposition of the three specific fees, contending that the court erred by failing to determine his ability to pay them. He argues that the fees should accordingly be stricken but if we remand for a determination of his ability to pay, he asserts that the court should also be directed to specify on the record the amounts of the penalty assessments and their statutory bases. He further contends that the abstract of judgment should be corrected to reflect that a violation of section 285, incest, is not among the list of violent felonies under section 667.5, subdivision (c), so that the box labeled "consecutive 1/3 nonviolent" with respect to this count should instead be checked. We agree and accordingly strike the three fees and direct correction of the abstract of judgment.

STATEMENT OF THE CASE

The underlying facts are not germane to the appeal and it is thus not necessary to delve into them in detail. It suffices to say that defendant twice had sexual relations with his adult, "developmentally disabled" daughter, who was in his care for approximately seven months, and that this produced a child.

Defendant was charged by felony complaint filed May 31, 2006 with two counts of rape of a victim incapable of giving consent in violation of section 261, subdivision (a)(1) (counts 1 & 2) and one count of incest in violation of section 285 (count 3). The complaint also alleged that defendant had served a prior prison term within the meaning of section 667.5, subdivision (b)—inflicting corporal injury on a spouse in violation of section 273.5.

On February 28, 2007, a doubt was declared about defendant's competence to stand trial under section 1368 and criminal proceedings were suspended. Following an

evidentiary hearing on November 8, 2008, at which disputed expert testimony about defendant's competence was presented, the court found him competent to stand trial and reinstated criminal proceedings.

After waiving his right to a preliminary hearing and other rights, defendant pleaded guilty to all three counts and admitted the prior prison term on the condition that he receive a sentence of four years and eight months. The court found a factual basis for the plea. During the course of the waivers, the court informed defendant, among other things, of various fines and fees that would be imposed at sentencing. At one point, the court said, "And then on the sexual offenses there [are] also a few fees . . . and assessments that I *have to* impose; they would include an AIDS education fee and a special one-time fee for the 261 charges," presumably referring to the section 290.3, subdivision (a) sex offender fee. (Italics added.) The court also directed defendant to fill out a statement of assets form, which the court informed defendant it would use to help it determine if he had the ability to pay victim restitution.

In accordance with the negotiated plea, the court later imposed a prison sentence of four years, eight months, consisting of the low term of three years in count 1; a concurrent low term of three years in count two; a consecutive eight-month term, or one-third the midterm, in count three; and one additional year for the prior prison term enhancement. The court awarded defendant credit of 958 actual days plus 143 days under section 2933.1, for a total of 1101 days of presentence credits. The court also imposed various fines and fees, among them a $70 AIDS education fee under section 264, subdivision (b); a $129.75 criminal justice administration fee under Government Code section 29550.2, subdivision (a); and a $200 sex offender fee under section 290.3, subdivision (a).[2] When the court did so, defendant's counsel pointed out that he was

[2] The court did not state on the record either the amounts of penalty assessments that would be imposed on the AIDS education and sex offender fees or their statutory

indigent at the time of the crimes and had been for many years. Counsel asked if "any of the fines and fees could be run concurrent[ly] with the sentence." The court responded that it was not going to impose any attorney fees—presumably under section 987.8, which requires a determination of an ability to pay—and stated, "the rest of [the fines and fees] are the ones that have to be imposed[;] I would take that into consideration but I believe they do." The prosecutor did not dispute defendant's indigency.

Notice of appeal was timely filed.

After that, on June 23, 2009, defendant's appellate counsel wrote to the trial court to request that it correct what she asserted to be an error in the abstract regarding the calculation of presentence credits. The letter pointed out that defendant was entitled to "half-time credits under Penal Code section 4019 instead of 15 percent credits under section 2933.1," such that he was entitled to a total of 1,436 days, consisting of 958 actual days plus 478 days in section 4019 credits, 335 more days than he was awarded.[3] In response, the trial court issued a corrected minute order and amended the abstract of judgment, of both of which we have taken judicial notice, reflecting 1,436 total days of credits.

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bases. But both the minute order and abstract of judgment reflect that $164.50 was imposed as penalty assessments on the AIDS education fee and $470 was imposed as penalty assessments on the sex offender fee. The court also imposed a $60 court security fee under section 1465.8, a restitution fund fine of $2,400 under section 1202.4, subdivision (b), and a parole revocation fine under section 1202.45 in like amount. Defendant does not challenge these latter amounts on appeal.

[3] Section 2933.1 limits presentence credits for persons convicted of violent felonies as listed in section 667.5, subdivision (c) to 15 percent whereas section 4019 otherwise allows for half-time credit. According to counsel's letter, this meant that at that point, defendant had already served more time than he was required to.

DISCUSSION

I. *The Challenged Fees Should Be Stricken*

As both sides agree, the statutory bases for the three challenged fees all contain provisions for a determination by the trial court of a defendant's ability to pay and are conditioned on such ability.[4] The dispute centers on whether the trial court actually did make a determination of defendant's ability to pay, albeit an implied one,[5] based on its comments in response to defense counsel's pointing out that defendant was indigent and his request that "fines and fees be run concurrent[ly] with the sentence." Defendant interprets the court's remarks as evidence of its belief that the challenged fees were

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[4] Section 264 concerns the punishment for rape, as defined in sections 261 or 262. Section 264, subdivision (b) provides that "[i]n addition to any punishment imposed under this section the judge may assess a fine not to exceed seventy dollars ($70) against any person who violates section 261 or 262 with the proceeds of this fine to be used in accordance with Section 1463.23 [concerning the AIDS education program]. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision."

Government Code section 29550.2, subdivision (a) concerns the criminal justice administration fee, which is collected by the particular county in which a defendant was booked. In relevant part, the subdivision provides for the imposition of the fine to cover the administrative costs for booking "[i]f the [defendant] has the ability to pay."

Section 290.3, subdivision (a) concerns the sex offender fee and provides in relevant part for the imposition of the fine "unless the court determines that the defendant does not have the ability to pay" it.

[5] A trial court's determination of a defendant's ability to pay fines and fees need not be express but may be implied through the content and conduct of the hearings. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1516 [Health & Saf. Code, § 11372.7, subd. (a) drug program fee]; *People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1377 [former Gov. Code, § 13967, subd. (a) restitution fine]; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1836 [same]; *People v. Phillips* (1994) 25 Cal.App.4th 62, 71[§ 1203.1b probation costs]; *People v. Staley* (1992) 10 Cal.App.4th 782, 784-786 [Health & Saf. Code, § 11372.7, subd. (a) drug program fee; Health & Saf. Code, § 11372.5 lab analysis fee; § 1202.4 restitution fund fine].)

mandatory regardless of defendant's ability to pay. The People somewhat creatively interpret the remarks as an indication that the court actually did take into account whether defendant had the ability to pay and made a determination that he did. Creativity aside, defendant has the better argument based on the record.

First, as noted, at the change of plea hearing, the court discussed the ramifications of a guilty plea, i.e., punishment, and pointedly referenced the AIDS education fee and the sex offender fee. The court said these were among "fees … and assessments that [it had] to impose." Then, when the fees were later imposed at sentencing and in response to defense counsel's request, the court said it was not going to impose any attorney fees, presumably based on defendant's indigency, and again referred to the fines and fees that were being imposed as if they were mandatory regardless of defendant's ability to pay. The court added that it "*would* take [defendant's indigency] into consideration" but restated its belief that the fees nevertheless had to be imposed. (Italics added.)

The only plausible way to read the court's comments, particularly in light of its earlier comments about certain fees relating to sex crimes being mandatory and its decision not to award attorney fees, is that the court was of the mistaken view that it had to impose the challenged fees regardless of ability to pay, but if that were not the case and it instead did have the authority to have taken ability to pay into account, it would have. The court's comments mean that, contrary to the relevant statutes, it did not make a determination of defendant's ability to pay the fees, either expressly or impliedly. This was error.

The question remains whether to remand for a determination of defendant's ability to pay before the three challenged fees may be reimposed, or to simply strike the fees. Based on considerations of judicial economy and a record that suggests that defendant

does not have the ability to pay,[6] we elect to strike the fees.[7] (*People v. Walker* (1991) 54 Cal.3d 1013, 1029 [judicial economy warranted modifying judgment on review to reduce restitution fine to statutory minimum rather than remand for determination of appropriate amount of fine]; *People v. Taylor* (2004) 118 Cal.App.4th 454, 456.)

II. *The Amended Abstract of Judgment Should be Corrected to Reflect That a Violation of Section 285 is Not a Violent Felony Under Section 667.5, Subdivision (c)*

Defendant contends that although the abstract of judgment has already been amended by the trial court to reflect presentence credits totaling 1436 days, the abstract should be further corrected so that his conviction for incest is categorized as a nonviolent felony. The basis for this contention is that section 285 is not listed among violent felonies in section 667.5, subdivision (c). This section provides for a three-year sentence enhancement for a prior prison term where a new offense is included in the specified list of violent felonies but a one-year enhancement where the new offense is not so included. (§ 667.5, subds. (a) & (b).) Although the People speculate as to the reason why the offense is characterized as a violent one in the abstract and suggest that this characterization relates to the imposition of a consecutive sentence for this offense rather than to the enhancement, they acknowledge that incest is not included in section 667.5. subdivision (c)'s list of violent felonies. They also urge that because defendant received

[6] We note defense counsel's undisputed assertion of defendant's indigency at sentencing and an earlier reference in a competency report to the effect that defendant had not worked since 1978 and had been receiving SSDI since 1990.

[7] This conclusion means that unspecified penalty assessments on the AIDS education fee and the sex offender fee are also stricken and we need not separately address the propriety of these assessments and the court's failure to have identified on the record the amounts of the assessments or their statutory bases. (See *People v. Eddards* (2008) 162 Cal.App.4th 712, 717-718; *People v. High* (2004) 119 Cal.App.4th 1192, 1200 [both requiring that the amount and statutory basis of penalty assessments be itemized and specified by the court in the record].)

only a one-year enhancement, he has not been prejudiced by the categorization of his section 285 conviction as a violent felony.

We agree with defendant that for the sake of accuracy, the abstract of judgment should again be corrected to show that with respect to count 3, defendant's conviction of section 285 for incest, the offense is categorized as "consecutive 1/3 nonviolent" rather than "consecutive 1/3 violent."

DISPOSITION

The clerk of the superior court is directed to issue a corrected abstract of judgment to reflect that (1) the $70 AIDS education fee (§264, subd. (b)), the $129.75 criminal justice administration fee (Gov. Code, § 29550.2, subd. (a)), the $200 sex offender fee (§ 290.3), and related penalty assessments are stricken; and (2) that defendant's conviction of count 3 for incest in violation of section 285 is an offense that is characterized as "consecutive 1/3 nonviolent." The clerk is further directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

Duffy, J.

WE CONCUR:

Mihara, Acting P.J.

McAdams, J.